(8)

No. 95-6556

In The

Supreme Court of the United States

October Term, 1995

JOHNNY LYNN OLD CHIEF,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED FOR REVIEW

If the defendant in a felon in possession of a firearm case offers to stipulate to his status as a felon, should the district court require the government to accept the stipulation and preclude the government from introducing evidence of the nature of the prior felony?

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INTEREST OF *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers (NACDL) is a national organization of criminal defense attorneys dedicated to promoting the fair administration of criminal justice and ensuring due process for persons accused of crime. NACDL has over 8,700 members and 74 state and local affiliate criminal defense bar associations with over 25,000 members.

This case poses an issue of significant concern to *amicus curiae*, namely, whether a person charged with being a felon in possession of a firearm who is willing to stipulate or admit the offense element of being a felon, a status in itself cloaked with social opprobrium, can still have the irrelevant details of the nature of the prior, often years-past, felony set before the jury which will determine guilt or innocence in the current case. As an organization of defense attorneys, *amicus curiae* brings to the Court experience about the practical effects of the introduction of such prior conviction information.

Both parties consented to the filing of this brief, as reflected in letters lodged with the Clerk of this Court.

SUMMARY OF ARGUMENT

When a defendant charged with being a felon in possession of a firearm offers to stipulate or admit that he has previously been convicted of a felony, that stipulation or admission constitutes complete proof of the element of the prior felony and the judge can instruct the jury that it must accept that element of the offense as proven.

Because the nature of the prior felony is never relevant to the fact of whether the defendant has such a felony conviction, this stipulation or admission completely eliminates any justification for the government to offer evidence concerning the conviction. The details of the prior felony can only serve a non-permissible purpose, such as showing bad character or prior bad conduct. Finally, because the nature of the prior felony in these circumstances has no probative value whatsoever, such information will always be more prejudicial than probative.

This Court can fashion various alternative remedies to the problem. The government can be required to stipulate; the trial court can accept an admission in lieu of a stipulation; the court can require the government to redact the indictment and any documentary proof to strike the nature of the prior felony and similarly limit testimony. In some cases, a severance of counts may be a remedy, although that may still not solve the problem. In other cases, a bifurcated trial procedure may be appropriate. This Court can either establish an appropriate procedure, leave to the trial courts to select from an array of alternatives, or allow trial courts to use their own creativity to avoid the injustice of exposing the nature of the past felony.

ARGUMENT

I. THE NATURE OF A PRIOR FELONY IS NOT RELEVANT EVIDENCE IN A FELON IN POSSESSION OF A FIREARM CASE.

There are three elements in a prosecution for felon in possession of a firearm in violation of 18 U.S.C. § 922(g): first, whether the person has previously been convicted of a felony, that is, a crime punishable by imprisonment for a term exceeding one year; second, whether the person possessed the firearm, and third, whether the firearm had been in or affecting interstate commerce.

Fed. R. Evid. 401 defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

As several Circuits considering the problem have observed, the exact nature of the prior felony does not make more or less probable the existence of a prior conviction. *United States v. Tavares*, 21 F.3d 1, 4 (1st Cir. 1994); *United States v. Wacker*, 72 F.3d 1453, 1472 (10th Cir. 1996) (as modified). The *Wacker* court specifically noted:

> Whereas the fact of a defendant's prior felony conviction is material to a felon in possession charge, the nature and underlying circumstances of a defendant's conviction are not. . . . The details of the defendant's prior crime do not make it "more probable or less probable" that the defendant is a convicted felon. . . . Rather, this information tends only to color the jury's perception of the defendant's

character, thereby causing unnecessary prejudice to the defendant.

72 F.3d at 1472. Thus, the nature of the felony is simply irrelevant to any issue in a felon in possession of a firearm prosecution.

II. IF A DEFENDANT OFFERS TO STIPULATE OR ADMIT TO THE FACT OF A PRIOR FELONY, THE ONLY PURPOSE FOR REJECTING THE OFFER AND ALLOWING THE PROSECUTION TO PROVE THE NATURE OF THE PRIOR CRIME IS TO SHOW THAT THE DEFENDANT IS A BAD PERSON, A PURPOSE OTHERWISE PROHIBITED BY THE RULES OF EVIDENCE.

Fed. R. Evid. 404 embodies a longstanding principle of American jurisprudence, namely, that a person should be judged guilty or not guilty only on evidence of whether he or she committed the crime now charged. That rule provides:

> Rule 404. Character Evidence not Admissible to Prove Conduct; Exceptions; Other Crimes
>
> (a) Character evidence generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:
>
> (1) Character of accused. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same;
>
> . . .

> (b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. . . .

Evidence that a defendant charged solely with being a felon in possession of a firearm previously committed another gun crime, or a crime of violence, or any particular type of crime, cannot be admitted to prove that he or she is likely to have committed the crime of felon in possession of a firearm or to show that he or she is a person of bad moral character and thus predisposed to be a felon in possession of a firearm. Nor may evidence of the nature of this previous felony conviction be admitted to show that a person, such as Mr. Old Chief, who is charged with felon in possession of a firearm along with other crimes is, therefore, more likely to be guilty of the other crimes charged.

Here Johnny Lynn Old Chief was on trial for three charges, felon in possession of a firearm (Count I), using or carrying a firearm during commission of a violent crime (Count II), and assault with a dangerous weapon (Count III). Had he only been on trial for the charge of assault with a dangerous weapon (or even assault plus using or carrying a firearm during a crime of violence), the prosecution would not have been permitted to inform the jury that Mr. Old Chief had previously assaulted someone else and been convicted of that charge in federal court. Rule 404(b) would have precluded admission of the fact that he had previously been convicted of assault. Yet because the assault charge was joined in the indictment with the felon in possession of a firearm charge, despite

Mr. Old Chief's willingness to stipulate to the prior felony element of the charge in Count I, the government was able to inform the jury that Mr. Old Chief had been convicted in federal court of assault resulting in serious bodily injury on a different individual four years earlier. Such evidence would serve only to show that he is a person of bad character or to show that, having assaulted someone four years ago, he is more likely to have assaulted someone on the occasion in question. Both those purposes are specifically precluded by Rule 404(b). No juror can reasonably be expected to compartmentalize his or her mind to consider the prior assault only on Count I, and not consider it as to Counts II and III.

III. THE PREJUDICIAL EFFECT OF ADMITTING THE NATURE OF THE PRIOR FELONY VASTLY OUTWEIGHS ANY NEGLIGIBLE PROBATIVE VALUE OF THE JURY KNOWING THE NATURE OF THE PRIOR FELONY CRIME.

Fed. R. Evid. 403 excludes even relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." The Advisory Committee Notes on this rule define "unfair prejudice" as "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one."

As the First Circuit wrote in *United States v. Melvin*, 27 F.3d 703, 707 (1st Cir.), *modified on other grounds*, 27 F.3d 710 (1st Cir. 1994), "evidence regarding the nature of the

prior felony is precisely the type of evidence which prejudices a jury." The court went on to note that "[t]his evidence of prior convictions would prejudice almost any jury in these circumstances, no matter how conscientious." *Id.* at 709. It is fundamental to the fairness of the jury trial system that the court sift and screen out evidence that jurors do not need to evaluate the guilt or innocence of the charged crime but would have the effect of injecting emotional prejudice.

The likelihood of prejudice is magnified in some cases, such as this one, where the defendant is charged with the same type of crime as the prior felony. As the Fourth Circuit held in *United States v. Poore*, 594 F.2d 39, 41 (4th Cir. 1979), evidence of a prior gun offense clearly prejudiced defendant's trial on charges of illegally possessing a gun and being a felon in possession of a firearm.

> The prejudice against appellant in permitting the jury to be apprised of the nature of Poore's prior felony conviction by the use of unnecessary language descriptive of that felony conviction contained in Count II is clear. The prior felony conviction was for "carrying a handgun," the same type of firearm offense with which appellant is being charged in this case. Despite the district court's precautionary instructions, we recognize that "to the layman's mind a defendant's criminal disposition is logically relevant to his guilt or innocence of a specific crime." *United States v. Foutz*, 540 F.2d 733, 736 (4th Cir. 1976). Therefore, we must conclude that it was not unlikely that the jury, being apprised of the fact that appellant had previously been convicted of a like firearms offense, considered that fact in passing on his guilt or innocence of

> the offenses charged in this case. Any such consideration, of course, would be improper. To prevent such prejudice from occurring, the district court should have stricken the objectionable language from Count II of the indictment.

Id. at 41-42 (footnote omitted).

In this case, the prejudicial effect of this inappropriately admitted evidence was compounded by repetition. The jury heard about Mr. Old Chief's prior assault resulting in serious bodily injury five different times: during reading of the indictment for voir dire (Tr. 25), during the prosecutor's opening statement (Tr. 52), when a certified copy of the prior conviction was introduced into evidence during the government's case-in-chief (J.A. 21; Tr. 74-75), during the prosecutor's closing argument (Tr. 282), and again during jury instructions (J.A. 33, 34).

Although not present in this case, other unfairly prejudicial effects would result if this Court were to approve a rule allowing the government to introduce evidence of the nature of the defendant's prior felony conviction when the defendant is willing to stipulate to the fact of conviction. For example, the prior felony may be for a heinous and especially socially despised felony, such as in *United States v. Kemper*, 503 F.2d 327, 328 (6th Cir. 1974), *cert. denied*, 419 U.S. 1124 (1975), where the prior felony was "interstate transportation of a female for the purpose of having her practice prostitution and for other immoral purposes." In *United States v. Jones*, 67 F.3d 320 (D.C. Cir. 1995), the defendant's prior conviction was for possession with intent to distribute cocaine, a crime of great social concern.

The previous felony itself may suggest a trail of more than one prior conviction, as for when the felony is for escape from federal custody as in *United States v. Spletzer*, 535 F.2d 950 (5th Cir. 1976), for assault on one's federal probation or parole officer in violation of 18 U.S.C. § 1114, or for committing an assault while incarcerated in a federal correctional institution.

Where it is not barred by appropriate enforcement of Fed. R. Evid. 404 or by applicable caselaw, the government may seek to increase the prejudice by proving a series of prior felonies. It is the official policy of the Department of Justice to do so. *See Department of Justice Manual*, Vol. 9A, Title 9, Criminal Division, Part 3A, § 9-63.513 (1993-2 Supp.). In *United States v. Wacker*, 72 F.3d 1453, 1471 n.14 (10th Cir. 1996) (as modified), for example, one defendant had prior convictions for possession with intent to distribute marijuana, two counts of murder, and one count of aggravated assault with a deadly weapon. The government introduced evidence of all four prior felonies to prove that the defendant was a convicted felon (to prove that element of the charge of felon in possession of a firearm) despite the defendant's offer to stipulate to the prior felony convictions.

Finally, the prior felony may be very old, as there is no time limit on the post-felony conviction ban on possession of a firearm. That a defendant committed a heinous act thirty years before should not be used to invite jurors to infer that his or her current lifestyle is anti-social. The evidence at trial should be limited to the proof that is relevant to the current charge.

IV. THIS COURT CAN FASHION REMEDIES THAT WILL ALLOW THE JURY TO KNOW THE FACT THAT A DEFENDANT HAS A PRIOR FELONY BUT PRECLUDES THE NON-RELEVANT AND PREJUDICIAL INFORMATION OF THE NATURE OF THAT PRIOR FELONY.

Courts confronting this problem have responded with various solutions. The simplest resolution of this issue is to require that, when the defendant is willing to stipulate that he or she has a prior conviction for a crime punishable by imprisonment for a term exceeding one year, the government be required to so stipulate. The court then would strike the language descriptive of the nature of the prior felony from the indictment. *Poore*, 594 F.2d at 43. The court also would preclude reference in the proof and argument to the nature of the prior felony. Then the trial court would instruct the jury that while the crime has three elements that must be proved beyond a reasonable doubt, the jury must accept that the first element of a prior felony has been so proved.

The Tenth Circuit took that approach in *United States v. Wacker*, 72 F.3d 1453, 1472-73 (10th Cir. 1996) (as modified):

> [W]e hold that where a defendant offers to stipulate as to the existence of a prior felony conviction, the trial judge should permit that stipulation to go to the jury as proof of the status element of section 922(g)(1), or provide an alternate procedure whereby the jury is advised of the fact of the former felony, but not its nature or substance. *See Tavares*, 21 F.3d at 4 (citing other non-prejudicial alternatives). Correspondingly, in those situations where the defendant is willing to concede the existence of the prior felony conviction, the trial judge should ordinarily preclude the government from introducing any evidence as to the nature or substance of the conviction, as the probative value of this additional information generally will be overshadowed by its prejudicial effect under Federal Rule of Evidence 403.

Alternatively, if the defendant is willing to admit the prior felony, by written signed admission or otherwise, even absent concurrence from the prosecutor, the same procedure should be required. The Court could require the admission to be signed by the defendant as well as defense counsel and the admission would be read to the jury by counsel, the court, or a clerk, and the jury similarly instructed that the admission must be accepted as proof of the prior felony element.

Finally, the fact, but not the nature, of a prior felony could be presented to the jury by affidavit of a document custodian or by redacted judgment documents, followed by similar instructions to the jury. *See, e.g., Wacker*, 72 F.3d at 1472 ("The majority of the circuits . . . hold that evidence concerning the nature of the predicate crime in a felon in possession case is irrelevant and prejudicial. Such evidence should therefore be excluded if possible by use of a redacted record, stipulation, affidavit, or other similar technique whereby the jury is informed only of the fact of a prior felony conviction, but not of the nature or substance of the conviction.").

A more cumbersome solution is a bifurcated trial, with the jury first deciding whether the elements of possession of a firearm and the interstate commerce nexus

have been proved beyond a reasonable doubt, and only then having a second factfinding proceeding to determine the prior felony element.

Where a defendant is charged with counts in addition to the felon in possession of a firearm charge, the trial court could grant severance of the felon in possession count unless the nature of the prior felony is independently admissible. *United States v. Busic*, 587 F.2d 577 (3d Cir. 1978), *rev'd on other grounds*, 446 U.S. 398 (1980).

> Courts have held that joinder of an ex-felon count with other charges requires either severance, bifurcation, or some other effective ameliorative procedure. *See, e.g., United States v. Joshua*, 976 F.2d 844 (3d Cir. 1992) (bifurcated trial is appropriate when government joins felon in possession count with other charges and proof of felony would not be admissible at trial on other counts); *United States v. Dockery*, 955 F.2d 50 (D.C. Cir. 1992) (district court abused its discretion in failing to grant bifurcated trial or to fashion other procedures sufficient to curb prejudice from inclusion of ex-felon count); *United States v. Desantis*, 802 F. Supp. 794, 803 (E.D.N.Y. 1992) (court ordered severance of ex-felon count because of manifest danger of prejudice).

United States v. Jones, 16 F.3d 487, 492 (2d Cir. 1994). However, while this method eliminates the prejudice to the defendant on the other counts, it does not eliminate the prejudice on the felon-in-possession count.

A trial court also could give the government a choice. If the government were unwilling to enter into a stipulation telling the jury only the fact of the former conviction

and the court was reluctant to force the government to accept the stipulation, then the court could order severance of the felon-in-possession charge. *See, e.g., United States v. Dockery*, 955 F.2d 50 (D.C. Cir. 1992) (trial court may order severance of felon-in-possession charge where government refuses to enter into a stipulation that advises the jury merely of the fact of the former conviction).

None of these remedies weakens the government's legitimate interest in presenting its case. Indeed, the presentation is strengthened by the court's definitive instruction to the jury that one element of the crime must be accepted as proved. In such a case, the court would not give the usual instruction to the jury that they should consider whether or not the government has proven that element beyond a reasonable doubt.

CONCLUSION

Whether this Court desires to outline possible remedies or leave those to the trial court, the National Association of Criminal Defense Lawyers urges this Court to rule that when a defendant offers to stipulate or otherwise admits that he has a prior felony conviction, the jury may not be informed of the nature of the conviction in any fashion (through the language of the indictment, evidence, argument, jury instruction, or otherwise).

Respectfully submitted,

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